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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARVIN P. LOEB et al.,	
Plaintiffs and Appellants,	G049548
v.	(Super. Ct. No. 30-2012-00565607)
WENDY J. WHISTON,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Ostergar Law Group and Allen C. Ostergar III for Plaintiffs and Appellants.

Everett L. Skillman for Defendant and Respondent.

* * *

Plaintiff Marvin P. Loeb regrets relinquishing control of a fortune in cash and securities to his daughter, defendant Wendy J. Whiston.[1] Marvin and his son, plaintiff Alan E. Loeb, claim Wendy violated various understandings and obligations regarding the use of the assets, which were intended to benefit Wendy and her two children, Lilly and Jared Whiston.[2] The court concluded many of plaintiffs' legal theories lacked merit and, as a factual matter, Wendy had not breached her fiduciary duties in any material way. We affirm the judgment.

FACTS

Operative Complaint

According to plaintiffs, Wendy violated the terms of the Trust and custodial accounts set up for Lilly and Jared by spending money for improper purposes, e.g., to remodel her home and to purchase expensive equipment for Jared's entertainment. And aside from specific expenditures, Wendy transferred excessive amounts of money from designated Trust and custodial accounts into her personal accounts. Plaintiffs allege there was "at least $900,000 . . . in bank accounts controlled by [Wendy] that should be held for the exclusive benefit of her children or the . . . Trust."

Marvin created the Trust in 1999 for Wendy as "Primary Beneficiary" and Wendy's "living children, if any" as "Secondary Beneficiar[ies]," appointing himself and

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[1] By necessity, we use first names to denote the parties in this case, all of whom share the same last name with at least one other party.

[2] The assets were transferred in the form of an irrevocable trust (the Trust) and custodial accounts. Alan sues as trustee of the Trust, a position he has occupied since replacing Wendy in that role in March 2012. Marvin purports to sue both as an individual and as guardian ad litem for Lilly and Jared. Lilly and Jared have lived since their respective births with their parents, Wendy and Derek Whiston, and both minors testified by declaration that they opposed plaintiffs' lawsuit.

Wendy as co-trustees, each with the power to act on behalf of the Trust without the consent of the other.[3] The Trust authorized the trustee to "distribute as much of the income and property of the Trust (i) to the Primary Beneficiary . . . in such amounts as the Trustee from time to time hereafter deems reasonably necessary for his/her support, health and comfort . . . ." But other provisions of the Trust limited (at least in some circumstances) annual expenditures of the "property" of the Trust to 5 percent of its value (while allowing full use of annual income from the Trust).[4] Plaintiffs alleged that Wendy breached her fiduciary duty as trustee by distributing more than five percent of the Trust property (during unspecified years) and allowing interest income from the Trust to be deposited directly in her personal account.[5]

Marvin set up custodial accounts for his grandchildren and began transferring funds into these accounts when each grandchild was born. In 1992, Marvin allegedly told his children (including Wendy) that he would designate them as custodians for the benefit of their (as yet unborn) minor children, subject to Marvin's right to change the designation. Marvin orally asked his children to limit use of funds to "needs which

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[3] The evidence at trial showed that Marvin resigned as co-trustee in January 2008, leaving Wendy as sole trustee of the Trust.

[4] The actual provisions limiting distributions of Trust property, including section 5.0(c), state that they apply "upon [Marvin's] death" or "after [Marvin's] death." Marvin contended at trial, however, that because the provision of the Trust authorizing distributions by the trustee states this duty is "subject to . . . the limitation set forth in Section 5.0(c) of Article V," the trustee was actually limited to distributing 5 percent of the property in any single year, regardless of whether Marvin was living or dead.

[5] The Trust was "irrevocable and unamendable by any Trustee or Beneficiary." Nonetheless, Marvin alleged that he (as trustor) modified and renamed the Trust in 2012, replacing Wendy as primary beneficiary with Jared and Lilly, and appointing Alan as trustee of the successor trust. The dispute in this case regarding the Trust is limited to Wendy's conduct before March 2012 (i.e., when she was still trustee and beneficiary of the Trust), so we need not concern ourselves with the provisions of the amended Trust.

were not already their obligation as parents." Wendy agreed to do as Marvin said. A written confirmation of Marvin's instructions, signed by Marvin, was sent to his children on September 20, 1992. Marvin repeated many of the same instructions in July 1997, and sent an additional written confirmation at that time.

Jared was born in 1997. Marvin began providing checks (totaling $140,000) and securities of substantial value to Wendy as custodian for Jared. Lilly was born in 2003. Marvin provided additional checks (totaling $80,000) and securities of substantial value to Wendy as custodian for Lilly.

The operative complaint lists eight causes of action against Wendy: (1) removal of custodian per Probate Code section 3918, subdivision (f)[6]; (2) breach of fiduciary duty; (3) conversion; (4) breach of oral agreement; (5) declaratory relief; (6) constructive trust; (7) accounting; and (8) breach of trust pursuant to section 17200, subdivision (a)(12).

Summary Judgment Motion

Wendy moved for summary judgment or summary adjudication in April 2013, attacking each of plaintiffs' eight causes of action on a variety of grounds. The court granted the motion for summary adjudication as to the first, third, fourth, sixth, and eighth causes of action. Many of these rulings were "more in the nature of judgment on the pleadings." The court noted that the first and sixth causes of action requested additional remedies, but were not really distinct causes of action from the underlying breach of fiduciary duty cause of action. Moreover, the eighth cause of action merely restated the breach of fiduciary duty cause of action. The court denied summary adjudication as to the fifth and seventh causes of action (for declaratory relief and for an accounting), but noted that these requests for relief were again essentially dependent on

[6] All further statutory references are to the Probate Code unless otherwise stated.

proving Wendy's breach of fiduciary duty. Plaintiffs do not challenge most of the court's summary adjudication rulings in their appellate briefs.

The only summary adjudication rulings challenged in this appeal are the court's grant of summary adjudication on the third (conversion) and fourth (breach of oral agreement) causes of action. Regarding conversion, the court explained that plaintiffs had generally pleaded misuse of some portion of deposited funds rather than "specifically-identifiable funds." As to breach of contract, the court ruled that Marvin had described a donative transfer to his grandchildren rather than a contract (with consideration) between he and Wendy. We need not linger on the evidentiary materials introduced for the purposes of the summary judgment motion because of the nature of the challenged rulings.

Trial

Likewise, it is unnecessary to summarize the entirety of the evidence at trial, which included the introduction of hundreds of exhibits (primarily financial institution documents showing the accumulation and transfers of wealth in the Trust and custodial funds) and testimony from Wendy, Marvin, and others. In their appellate briefs, plaintiffs do not question the sufficiency of the evidence supporting the judgment. Instead, plaintiffs focus exclusively on whether the court properly applied the burden of proof and the statute of limitations for the breach of fiduciary duty cause of action.

It is helpful to contextualize the case, however, with a bird's eye view of the parties' positions and evidence. The parties stipulated to basic background facts. Marvin is the father of Alan and Wendy. Wendy has been married to her husband Derek since 1995. Marvin gave money and securities to Wendy pursuant to the Trust. Jared was born in 1997 and Lilly was born in 2003; both children have resided with their parents their entire lives. Neither Derek nor Wendy has ever been convicted of a felony or contacted by social services for parenting deficiencies. Neither of them is addicted to

alcohol, tobacco, or drugs. Marvin gave money and securities to Jared and Lilly after their respective births pursuant to the California Uniform Transfers to Minors' Act (§§ 3900-3925 (UTMA)), not pursuant to a written trust document. Wendy is the custodian of accounts holding her children's money and securities.

In his opening statement, defense counsel largely conceded the basic factual framework alleged in the complaint but disagreed that Wendy had done anything wrong by spending money in the custodial accounts and the Trust. "Wendy . . . had the authority to withdraw amounts from the custodial accounts and spend them for the benefit of the minors. She did that. . . . She spent them on educational expenses. She spent them on medical expenses. She spent it for tutors. She spent it on a number of things that were for the benefit of the minors, and it was in [her] sole discretion that she decided even something that [Marvin] disagrees with, such as hockey registration, ice time, so that Jared can learn how to play hockey; that is for the benefit of the minor." Some transfers from the custodial accounts to her personal accounts were designed to reimburse Wendy for expenditures she had already made on behalf of her children. With regard to the Trust, defense counsel cited Marvin's service as co-trustee until 2008 and Wendy's obligation as trustee to provide for her own support, health, and comfort as primary beneficiary of the Trust until 2012.

Plaintiffs conceded they had no "direct evidence [Wendy] took the funds and bought jewelry or she took a vacation. What we *do* have is large amounts of funds that were transferred to her personal accounts and are gone." One key category of evidence emphasized by plaintiffs is Wendy's transfer of hundreds of thousands of dollars into accounts that were not identified as Trust accounts or custodial accounts. In other words, plaintiffs argued it was a breach of fiduciary duty to maintain Trust and custodial assets in accounts not specifically so designated (regardless of Wendy's subjective intent), and a further breach of fiduciary duty to fail to keep otherwise sufficient records to prove that expenditures from various accounts were legitimate.

Moreover, by transferring significant Trust assets to non-Trust denominated accounts at particular points in time, Wendy supposedly violated the alleged Trust prohibition against removing more than 5 percent of Trust property in a single year.

Based on a review of financial documents by plaintiffs' expert witness, plaintiffs argued there was $324,108.32 "missing from" the Trust, $63,685.38 missing from Jared's custodial account, and $67,491.06 missing from Lilly's custodial account.[7] Plaintiffs' counsel represented to the court before trial that each minor still had a $470,000 certificate of deposit, as well as a separate stock brokerage account, under the control of Wendy as custodian. Plaintiffs' counsel likewise represented before trial that the Trust still had more than $400,000 and a separate stock brokerage account under the control of Alan as trustee.

Wendy testified that she treated all Trust or custodial money as Trust or custodial assets, regardless of the technical account designation on financial institution documents. Wendy was not aware of an obligation to utilize a particular naming convention for Trust or custodial accounts. By Marvin's admission, Wendy was not financially sophisticated. Wendy made thousands of expenditures of custodial funds on behalf of her children, many in nominal amounts. Wendy denied that she ever took her children's custodial funds for her personal use. And some of the funds now contested by plaintiffs were actually straightforward gifts to Wendy personally, not diverted Trust money.

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[7] Remaining true to their theory of the case, plaintiffs' presentation of the evidence at trial and in their appellate briefs makes no effort to distinguish reasonable and proper uses of Trust and custodial funds from unreasonable or improper uses of Trust and custodial funds. They claim that any distribution or expenditure by Wendy is prima facie evidence of wrongdoing. Hence, any expenditure of funds or transfer of funds to Wendy's personal account is presented by plaintiffs as supposed evidence of misconduct. This mode of presentation generates more heat than light, in that it ignores the fact that the Trust and custodial accounts were clearly designed to be used by their beneficiaries, not to sit idle.

Key Court Rulings and Defense Judgment

After hearing the evidence and argument by counsel, the court issued its decision. First, the court ruled that the four-year statute of limitations set forth in Code of Civil Procedure section 343 foreclosed consideration of any alleged breach of fiduciary duty prior to April 30, 2008.[8] Second, the court ruled plaintiffs had "failed to prove by a preponderance of the evidence any material breach of fiduciary duty by defendant Wendy Whiston vis-à-vis either Jared Whiston or Lilly Whiston . . . ." A defense judgment was entered in accordance with the court's rulings.

At a subsequent hearing, the court denied plaintiffs' motion to vacate the judgment. The court noted that its trial decision had been based in part on Marvin's lack of credibility and Wendy's credibility. Wendy "had a credible explanation for everything that came under attack. Incidentally, it was no surprise to me that there were numerous transfers in the [custodial accounts because Wendy] is their mother. I was certainly unable to draw any negative conclusions from that alone. Moreover, to the extent that [Wendy] was confronted at trial with specific transactional anomalies, they were . . . of a de minimus nature. Overall, she left me with the impression of a prudent caring parent." The court observed, "everything that happened during [trial] persuaded me that at bottom, the case was [not really about] an alleged mismanagement of accounting. And, instead, it was very much the case of an inexplicable vindictiveness by [Marvin] toward his daughter. And he portrayed a very unattractive smugness on his part, that he was simply just a better manager than she was. [¶] But when it came down to it, the evidence of her purported misconduct, was really little more than unsubstantiated suspicion." "[A]lthough there are far too many transactions for me to itemize here, there was no evidence that any of them resulted in any illegitimate or extravagant or unusual expense."

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[8] The initial complaint was filed on April 30, 2012.

DISCUSSION

There was undisputed evidence at trial that Wendy did not carefully observe a strict, formal separation between her personal financial accounts and her roles as trustee and custodian. But Wendy was not an independent trustee or custodian. For purposes of the Trust, she was both trustee and primary beneficiary at all relevant times (and her children were secondary beneficiaries). For purposes of the custodial accounts, she was the mother of the beneficiaries, spending money in the ordinary course on their wants and needs. Wendy was selected to be trustee and custodian because of her status as Marvin's daughter and the mother of Jared and Lilly, *despite* her known lack of financial sophistication. Plaintiffs sued Wendy for alleged breaches of her fiduciary duty to the Trust even though she was the primary beneficiary during the relevant period, and even though Wendy had already been removed as trustee and all remaining Trust funds (even those previously held under her name) had been removed from her control. Plaintiffs sued Wendy for alleged breaches of fiduciary duty as custodian even though Jared and Lilly disagreed with such lawsuit and there was no evidence Wendy actually spent their money on anything but goods and services for the children.

Before turning to the specific contentions advanced by plaintiffs on appeal, we first set forth the most pertinent statutory provisions applicable to this dispute.

Trusts

"The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." (§ 16040, subd. (a).) The particular Trust at issue here required the trustee (i.e., Wendy) to use

Trust assets to provide for the primary beneficiary's (i.e., Wendy's) "support, health and comfort."

"The trustee has a duty to administer the trust solely in the interest of the beneficiaries." (§ 16002, subd. (a).) "[A] beneficiary may not hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the act or omission." (§ 16463, subd. (a).) "If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest." (§ 16440, subd. (a)(1).)

Plaintiffs emphasize Wendy's duties to segregate trust funds and account for expenditures. "The trustee has a duty to do the following: [¶] (a) To keep the trust property separate from other property not subject to the trust. [¶] (b) To see that the trust property is designated as property of the trust." (§ 16009.) "[T]he trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." (§ 16062, subd. (a); see § 16063 [details required in account].) But "[t]he trustee is not required to account to the beneficiary . . . . [¶] . . . [¶] (b) If the beneficiary and the trustee are the same person." (§ 16069.)

Wendy was both the trustee and primary beneficiary of the (ostensibly irrevocable) Trust at the time of her alleged acts and omissions; obviously, she is not (and could not be) suing herself for breach of trust. But plaintiffs point out that Jared and Lilly were secondary beneficiaries during Wendy's trusteeship (from the time they were born until the amendment of the Trust, when they became primary beneficiaries). Marvin, as guardian ad litem, and Alan, as current trustee, claim to have standing to sue for Wendy's alleged breaches of trust. Marvin also purports to sue as an individual, perhaps implicitly asserting (at least in the alternative) that the Trust was not actually irrevocable

(notwithstanding its label). (See § 15800 [duties of trustee owed to living settlor of revocable trust rather than beneficiary].)

Custodial Accounts

The UTMA governs custodial gifts to minors. (§ 3900 et seq.) Wendy was designated as the custodian of money and securities given to Jared and Lilly. (See § 3909.) "A transfer made pursuant to Section 3909 is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties, and authority provided in this part, and neither the minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this part." (§ 3911, subd. (b).) "A custodian shall do all of the following: [¶] (1) Take control of custodial property. [¶] (2) Register or record title to custodial property if appropriate. [¶] (3) Collect, hold, manage, invest, and reinvest custodial property." (§ 3912, subd. (a).)

"A custodian may deliver or pay to the minor or expend for the minor's benefit as much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (1) the duty or ability of the custodian personally, or of any other person, to support the minor or (2) any other income or property of the minor which may be applicable or available for that purpose." (§ 3914, subd. (a).) But "[a] delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect, any obligation of a person to support the minor." (§ 3914, subd. (c).)

"In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries except that: [¶] (1) If a custodian is not compensated for his or her services, the custodian is not liable for losses to custodial property unless they result from the custodian's bad faith, intentional

wrongdoing, or gross negligence, or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in this section. [¶] (2) A custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor." (§ 3912, subd. (b)(1), (2).) "A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties." (§ 3915, subd. (a).)

Again, Marvin (as guardian ad litem for Jared and Lilly) emphasizes Wendy's duties to segregate custodial funds and maintain proper records. "A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor." (§ 3912, subd. (d).) "A custodian shall keep records of all transactions with respect to custodial property . . . ." (§ 3912, subd. (e).)

Court Correctly Applied Burden of Proof

Plaintiffs argue the court applied the wrong burden of proof to its breach of fiduciary duty claims, both as to the Trust and the custodial accounts. A breach of fiduciary duty cause of action requires "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) "The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it; the burden then shifts to the trustee to justify its actions." (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517.) Plaintiffs' counsel conceded prior to trial that "certainly the burden of proof is on us." During closing argument, plaintiffs' counsel clarified, "No, the burden on the plaintiff is to show that there is a fiduciary duty and that there is a breach; once that's shown, then the burden shifts to the fiduciary to provide an explanation as [to] why she did what she did."

The gist of the issue on appeal appears to be whether the court shifted the burden to Wendy to defend her actions, once it was shown that she breached her fiduciary duty. The court acknowledged on the record that "there's no debate that [Wendy] had a fiduciary responsibility in some respects, both as to the trust, and . . . as to the custodial account[s]." And the record compels the conclusion that Wendy committed technical breaches of her statutory duties by maintaining improperly named accounts and failing to keep precise records for every transaction related to the Trust and the custodial accounts.

There is no statement of decision in the record or other extended exegesis of the court's rationale, by which plaintiffs could attempt to demonstrate that the court misunderstood the law. Instead, plaintiffs implicitly claim that the court's one sentence ruling on the merits (plaintiffs "failed to prove by a preponderance of the evidence any material breach of fiduciary duty by defendant Wendy Whiston vis-à-vis either Jared Whiston or Lilly Whiston") establishes that the court misapplied the burden of proof.

Plaintiffs' mode of analysis upends principles of appellate review. "'A judgment . . . is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As we have already observed, it is obvious there were some technical breaches by Wendy. Plaintiffs, however, fail to reckon with the word "material" in the court's summary decision. The court's ruling is entirely consistent with the burden being shifted to Wendy to explain the proven breaches of various statutory requirements. As evidenced by its subsequent comments about Wendy's credibility, the court believed Wendy committed technical breaches out of ignorance; funds were merely mislabeled, not dissipated. To plaintiffs' assertion that funds were "missing," the court apparently found Wendy had spent such funds in compliance with her roles as trustee and custodian. The court implicitly concluded there were no damages proximately caused by the technical breaches proven by plaintiffs. And plaintiffs, therefore, failed to prove Wendy committed any *material*

breaches of fiduciary duty (i.e., breaches that proximately caused damages). Nothing in the record demonstrates that the court misapplied the burden of proof.

Within the sections of its briefs devoted to the burden of proof issue, plaintiffs also, in essence, attack the court's findings that breaches of fiduciary duty by Wendy were not material and/or did not cause damages (e.g., by asserting Wendy violated Trust provisions that supposedly limited her to a 5 percent withdrawal of Trust property in any single year).[9] But to the extent plaintiffs expect this court to embark upon a review of the sufficiency of the evidence or the proper interpretation of the Trust without proper briefing, we must dash such expectation. Plaintiffs waived their right to a treatment of this issue "by failing to brief it properly under a separate heading . . . and . . . failing to provide adequate legal analysis." (*300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1257; see Cal. Rules of Court, rule 8.204(a)(1)(B) [Each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].) The only headings and subheadings in plaintiffs' briefs pertain to the burden of proof, not to the different questions of whether substantial evidence supports the court's conclusions or whether the court properly interpreted the Trust. Plaintiffs' standard of review section in their opening brief likewise discusses only the standard of review applicable to the selection of the burden of proof, and does not indicate that plaintiffs intended to raise a sufficiency of the evidence challenge or a challenge to the court's interpretation of the Trust.[10]

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[9] The record is unclear as to how the court interpreted the 5 percent limitation on distributions of Trust property.

[10] Without venturing into an analysis of the court's factual findings, we acknowledge a lengthy and well-reasoned district court case that addressed many of the issues raised here under a similar statutory regime. (*Weiss v. Weiss* (S.D.N.Y., Mar. 4, 1996, No. 91 Civ. 5115 (KMW) (MHD)) 1996 U.S. Dist. Lexis 2471, p. *1.) The *Weiss* court rejected contentions that a parental custodian could not use custodial funds for

Court Did Not Commit Prejudicial Error in its Application of the Statute of Limitations

The parties agree with the trial court that a four-year statute of limitations applies to breach of fiduciary duty claims like those brought by plaintiffs in this case. (Code Civ. Proc., § 343; but see § 16460 [three-year statute of limitations for breach of trust].) Plaintiffs assert, however, that the statute should not have foreclosed any of their claims for the entirety of the existence of the Trust and custodial accounts. Plaintiffs suggest there is insufficient evidence the breaches were discovered or should have been discovered by 2008, and further assert that Jared and Lilly should not be held to the statute of limitations in this case because of their status as minors.[11]

Regardless, any error in applying the statute of limitations as to any of the plaintiffs was harmless. "No judgment shall be set aside, or new trial granted, in any

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expenses beyond the bare necessities of life that the parent would provide anyway. (*Id*. at pp. *30-40.) The appropriateness of particular expenditures (e.g., a lavish bar mitzvah) was a question squarely within the province of the jury. (*Id*. at pp. *50-51.) The *Weiss* court also rejected the notion that a lack of "complete and detailed records" was somehow fatal to the defense of a breach of fiduciary duty claim. (*Id*. at p. *49.) In addition, the *Weiss* court held that a technical statutory violation, whether characterized as "a breach of fiduciary duties or as conversion," did not prevent the jury from finding plaintiff suffered no actual damages as a result of such breaches. (*Id*. at pp. *54-57.)

[11] As to invoking his grandchildren's rights, it does not appear that the issue of the propriety of Marvin suing as guardian ad litem under the circumstances of this case was ever squarely addressed below. Given Marvin's purported individual claims, the fractured personal relationship between himself and Wendy, and the minors' expressed wishes that the lawsuit go away, the court likely would have been justified in disqualifying Marvin as guardian ad litem based on a conflict of interest. (Code Civ. Proc., § 374, subd. (b) ["In making the determination concerning appointment of a particular guardian ad litem for purposes of this section, the court shall consider whether the minor and the guardian have divergent interests"].) It strikes this court as inherently problematic for Marvin, the settlor of the Trust and the donor of the custodial funds, to insert himself as legal representative of two of the beneficiaries of his munificence (as against the third, their mother). For purposes of this appeal, however, we ignore the propriety of Marvin's guardianship.

cause . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [error reversible only if appellate court forms """"'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been' reached in the absence of the error""].) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Plaintiffs' opening brief did not substantively address the question of prejudice. Plaintiffs merely assumed that the court's decision to consider for purposes of potential liability only evidence pertaining to transfers in the four years prior to the filing of the complaint was necessarily prejudicial: "The court's error resulted in prejudice to plaintiffs as a substantial number of transfers to [Wendy's] personal accounts occurred prior to April 2008 to the detriment of the trust and to her children." The reply brief includes a more detailed analysis of the prejudice question, but the basic point made by plaintiffs is that the court would have been faced with more of the same type of evidence concerning Wendy's utilization of the Trust and custodial accounts. Plaintiffs explain that the excluded years (i.e., from 1997 through 2008) resulted in more "missing" funds than the four years the court indicated it would consider. Plaintiffs express the view that there is a reasonable chance the court would have issued a different decision had it been forced to consider the sheer volume of so-called "missing" funds.

We fail to see how any prejudice could have arisen from the court's alleged statute of limitations error. There is no evidence that any of these early transactions were different in kind from the 2008 to 2012 transactions. The court was wholly unconvinced that Wendy had misused any Trust or custodial funds from 2008 to 2012, notwithstanding her failure to maintain precise records or to properly identify and segregate Trust and custodial funds. It stands to reason the court would be even more disinclined to view Wendy's more distant acts with suspicion. Indeed, Marvin was a co-trustee of the Trust until 2008 and most of the evidence pertaining to mislabeled accounts applied to post-2007 years. If anything, the court would have viewed the more recent transactions with more suspicion had it been inclined to find against Wendy. The court's emphatic statements criticizing Marvin and lauding Wendy make a different result even more implausible.

Summary Adjudication Properly Granted as to Breach of Contract

The issue presented as to this cause of action is whether an oral contract could be created via Marvin's promise of future, unspecified custodial gifts to Wendy's unborn children and Wendy's alleged agreement to Marvin's so-called "conditions," i.e., to allow herself to be removed and replaced as custodian at Marvin's discretion and to use custodial funds only for "needs, which are not [her] legal obligations" as a parent.

The documents evidencing this alleged oral contract certainly do not look like contracts. The first is labeled an "IMPORTANT NOTICE," and the second is labeled "DESIGNATION OF NOMINEE OR CUSTODIAN." Neither contains the word agreement or contract. Both include a signature line for and signature by Marvin (the self-identified "Grantor"), but neither includes a signature line for or signature by Wendy. The documents announce an intention by Marvin to grant assets to his grandchildren, but do not state that such future gifts are contingent on his children accepting certain terms of custodianship. The documents purport to dictate the legal terms of the custodianship, but

do not seek assent for such terms. For instance, the September 1992 notice states, "I may designate you to serve, at my will, as Nominee or Custodian FBO your minor children, subject to my right to change this designation and remove you as Nominee or Custodian FBO your minor children and replace you with a party of my choice as Nominee or Custodian of your minor children."

In sum, the documentary evidence of the supposed oral contract indicates that Marvin intended to clarify or modify the terms of the UTMA (or whatever law he thought was applicable at the time) in making contemplated future gifts to his grandchildren. These documents do not evidence the intent to extract enforceable promises from his children by way of contract law. Marvin informed his children of the way things were going to be; he did not bargain with them. An examination of these documents leads to only one reasonable conclusion: there was no contract.

This conclusion is further supported by the questionable "consideration" provided by both parties. (See Civ. Code, § 1605 [defining consideration for purposes of forming a contract].) "[A] mere promise to make a gift" is not enforceable. (*Dow v. River Farms* Co. (1952) 110 Cal.App.2d 403, 410.) There is no valid contract when one party has not assumed a legal obligation. (See *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 421-422.) Thus, there was no consideration on Marvin's side at the time of the alleged contracting, as he had only stated his intention to provide future, unspecified gifts to his grandchildren (and to appoint his children as unpaid custodians of such gifts).

Nor was there consideration on the other side of the alleged contract. Wendy's alleged agreement to spend custodial funds only for needs which were not already her obligation as a parent is already inherent to the role of custodian. (See § 3914, subd. (c) ["A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect, any obligation of a person to support the

minor"].) Agreeing to fulfill one's preexisting legal obligations is not consideration for a contract. (*Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 291-292.)

Marvin suggests that Wendy also agreed to resign her position as custodian upon Marvin's prompting, something that arguably represents consideration in that she would not be required to resign under the UTMA upon the request of the transferor. (See § 3918.)[12] But the allegations in the complaint and Marvin's notification documents clearly refer to his supposed right to revoke the designation of a custodian or, more specifically, to "remove Wendy . . . in my sole discretion." The documents do not state that Wendy must resign her position upon his request. The only reasonable interpretation of the available evidence is that Marvin was stating the terms upon which he planned to make donative transfers to his grandchildren.

Marvin's declaration in opposition to the motion for summary adjudication indicates that his children, including Wendy, agreed to these "conditions." But their receptiveness to Marvin's proposed generosity does not change the essential donative nature of the transaction or the fact that the so-called "conditions" did not represent consideration for a contract. The court correctly granted summary adjudication of Marvin's breach of contract cause of action.

No Prejudicial Error in Grant of Summary Adjudication as to Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession

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[12] Wendy claims Marvin's attempt to alter the requirements of section 3918 was illegal as against public policy. We need not determine whether transferors are entitled to alter the terms of the UTMA in making custodial gifts to minors. It is enough here to conclude that Marvin was attempting to do so directly under the UTMA (or the law of gifts and trusts more generally), not via a contract with Wendy. Indeed, this is the only way such an imposition on the rights of Jared and Lilly makes sense; their rights under UTMA, whatever they might be, were not for Wendy to discard via contract law.

of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544.) "A cause of action for conversion of money can be stated only where defendant interferes with plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284.)

Even assuming for the sake of argument that the court incorrectly granted summary adjudication of the conversion cause of action, reversal is not appropriate. An appellate court should not reverse an order granting summary adjudication if the court's error was harmless because the ruling was "correct in result." (*Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 114.)

The court essentially believed Wendy that all of Wendy's transfers and expenditures from the Trust and custodial accounts were legitimate and appropriate, and that no money was misappropriated for improper purposes. (See *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1742, fn. 19 [agreeing "with the general proposition that facts found by the trial court following trial may be relevant to the question whether error in a pretrial ruling was prejudicial so as to warrant reversal of the judgment"].) The reply brief summarily asserts that because the elements of conversion differ from that of breach of fiduciary duty, plaintiffs were prejudiced. But the court's findings on the fiduciary duty cause of action necessarily entail a conclusion that Wendy did not convert the assets of the Trust or custodial accounts. Based on our review of the entire record, we conclude that any error in granting summary adjudication as to the conversion cause of action was nonprejudicial.

DISPOSITION

The judgment is affirmed. Wendy's motion to strike or disregard portions of the opening brief is denied. Wendy shall recover her costs incurred on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.